

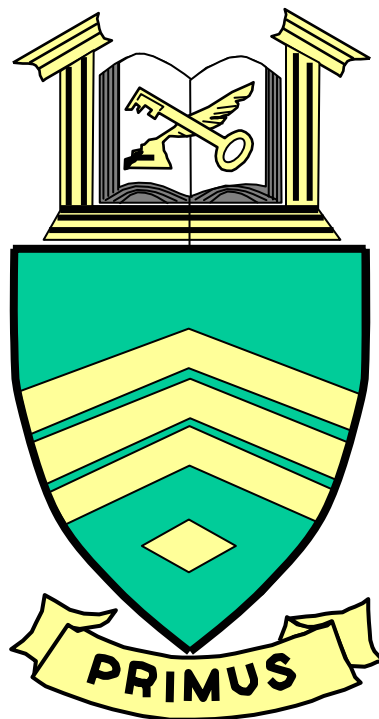
U.S. ARMY SERGEANTS MAJOR ACADEMY (FSC-TATS)

L672 (052002)

JUN 01

MANUAL FOR COURTS MARTIAL

PRERESIDENT TRAINING SUPPORT PACKAGE



Overview

The purpose of military law is to promote justice, assist in maintaining good order and discipline in the armed forces, and promote efficiency and effectiveness in the military establishment, thereby, strengthening the national security of the United States. Military law consists of the statutes governing the military establishment and regulations issued thereunder, the constitutional powers of the president and regulations issued thereunder, and the inherent authority of military commanders. Military law includes jurisdiction exercised by courts-martial and the jurisdiction exercised by commanders with respect to nonjudicial punishment. The Manual for Courts-Martial (MCM) contains military law.

In this lesson, we will briefly cover all parts of the MCM. We will also cover the main points of article 77 through 82 of the MCM and describe the procedures for search and seizure. This lesson will not make you an expert on military law; however, it will provide you with a better understanding of the Manual for Courts-Martial. As a first sergeant, it is important that you understand how to use this reference.

Inventory of Lesson Materials

Prior to starting this lesson ensure you received all materials (pages, tapes, disks, etc.) required for this Training Support Package. Go to the “**This [TSP or Appendix] Contains**” section on page two of the TSP and the first page of each Appendix, and verify you have all the pages. If you are missing any material, contact the First Sergeant Course Class Coordinator at the training institution where you will attend phase II FSC-TATS.

Point of Contact

If you have any questions regarding this lesson, contact the First Sergeant Course Class Coordinator at the training institution where you will attend phase II FSC-TATS.

PRERESIDENT TRAINING SUPPORT PACKAGE

**TSP Number/
Title** L672
Manual for Courts-Martial 2000

Effective date JUN 01

**Supersedes
TSPs** L672, Manual for Courts-Martial
DEC 99

TSP User This TSP contains a training requirement that you must complete prior to attending phase II, FSC-TATS. It will take you about one hour to complete this requirement.

Proponent The proponent for this document is the U.S. Army Sergeants Major Academy. POC: FSC TATS Course Chief, DSN: 978-8854/8848; commercial: (915) 568-8854/8848.

**Comments/
Recommendations** Send comments and recommendations on DA Form 2028 (Recommended Changes to Publications and Blank Forms) directly to:

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**Foreign
Disclosure
Restrictions** The lesson developer in coordination with the USASMA foreign disclosure authority has reviewed this lesson. This lesson is releasable to foreign military students from all requesting foreign countries without restrictions.

**This TSP
Contains**

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SECTION I ADMINISTRATIVE DATA**Tasks trained**

This lesson trains the tasks listed in the following tables:

Task number:	181-315-1001
Task title:	Manual for Courts-Martial,
Conditions:	as a First Sergeant, given extracts from Manual for Courts-Martial.
Standard:	IAW Manual for Courts-Martial, table of contents, pages II-27, II-28, III-12, III-13, III-14, III-15, III-16, IV-1, IV-2, IV-3, IV-4, IV-5, IV-7 and IV-8.
TASK Proponent:	Judge Advocate General

**Task(s)
Reinforced** None

**Prerequisite
Lesson(s)** None

**Clearance
and Access** There are no clearance or access requirements for this lesson.

Reference The following table lists the reference for this lesson:

Number	Title	Date	Para	Additional Information
MCM	Manual for Courts-Martial	2000	Pages II-27, II-28, III-12, III-13, III-14, II-15, III-16, IV-1, IV-2, IV-3, IV-4, IV-5, IV-7, IV-8 and contents.	None

Copyright Statement No copyrighted material reproduced for use in this lesson.

Equipment Required None

Materials Required This preresident training package contains all material necessary to complete this lesson.

Safety Requirements None

Risk Assessment Level Low

Environmental Considerations None

Lesson approval The following individuals have reviewed and approved this lesson for publication and incorporation into the First Sergeant Course--Total Army Training System.

Name/Signature	Rank	Title	Date
Kevin L. Graham	MSG	Training Developer	
Chris L. Adams	SGM	Chief Instructor, FSC	
John W. Mayo	SGM	Course Chief, FSC-TATS	

SECTION II INTRODUCTION

Terminal Learning Objective At the completion of this lesson, you will--

Action:	Gather legal advice from the Manual for Courts-Martial,
Conditions:	as a first sergeant in a classroom environment, given SH-1 and SH-2,
Standard:	Gathered legal advice from the Manual for Courts-Martial IAW SH-1 and SH-2.

Evaluation Before entering phase II FSC-TATS, you will receive the end of Phase I Performance Examination that will include questions based on material in this lesson. On that examination, you must answer at least 70% of the questions correctly to achieve a GO.

Instructional Lead-in This lesson is the first class in a series that will help you to become familiar with military law and the Manual for Courts-Martial.

SECTION III PRESENTATION

ELO 1

Action:	Determine how to locate information in the MCM,
Conditions:	as a first sergeant in a classroom environment, given SH-1 and SH-2,
Standard:	Determined how to locate information in the MCM IAW SH-1 and SH-2.

**Learning Step/
Activity (LS/A)
1, ELO 1**

To complete the learning activity, you must--

- Read ELO 1 above.
 - Read extracts from Student Handout 1 and 2, Appendix C.
 - Complete questions 1 and 2, LE-1, Appendix B.
 - Compare your responses with the suggested solution found in the solution to LE-1, (Appendix B).
 - If your response does not agree with the answer in the solution discussion, review the lesson material.
-

ELO 2

Action:	Determine the elements of article 77 and 79,
Conditions:	as a first sergeant in a classroom environment, given SH-1 and SH-2,
Standard:	Determined the elements of article 77 and 79 IAW SH-2.

LS/A 1, ELO 2 To complete the learning activity, you must--

- Read ELO 2 above.
- Read extracts from Student Handout 2, Appendix C.
- Complete question 3, LE-1, Appendix B.
- Compare your responses with the suggested solution found in the solution to LE-1, (Appendix B).
- If your response does not agree with the answer in the solution discussion, review the lesson material.

ELO 3

Action:	Determine the elements of article 78, 80, 81, and 82,
Conditions:	as a first sergeant in a classroom environment, given SH-1 and SH-2,
Standard:	Determined the elements of article 78, 80, 81, and 82 IAW SH-2.

LS/A 1, ELO 3 To complete the learning activity, you must--

- Read ELO 3 above.
 - Read extracts from Student Handout 2, Appendix C.
 - Complete questions 4, 5, 6, and 7, LE-1, Appendix B.
 - Compare your responses with the suggested solution found in the solution to LE-1, (Appendix B).
 - If your response does not agree with the answer in the solution discussion, review the lesson material.
-

ELO 4

Action:	Discuss Military Rules of Evidence (MRE) Rule 313, Inspections and Inventories in the Armed Forces,
Conditions:	as a first sergeant in a classroom environment, given SH-1 and SH-2,
Standard:	Discussed Military Rules of Evidence (MRE) Rule 313, Inspections and Inventories in the Armed Forces IAW SH-2.

LS/A 1, ELO 4 To complete the learning activity, you must--

- Read ELO 4 above.
- Read extracts from Student Handout 2, Appendix C.
- Complete question 8, LE-1, Appendix B.
- Compare your responses with the suggested solution found in the solution to LE-1, (Appendix B).
- If your response does not agree with the answer in the solution discussion, review the lesson material.

ELO 5

Action:	Discuss MRE Rule 314, Searches not requiring Probable Cause,
Conditions:	as a first sergeant in a classroom environment, given SH-1 and SH-2,
Standard:	Discussed MRE Rule 314, Searches not requiring Probable Cause IAW SH-2.

LS/A 1, ELO 5 To complete the learning activity, you must--

- Read ELO 5 above.
 - Read extracts from Student Handout 2, Appendix C.
 - Complete question 9, LE-1, Appendix B.
 - Compare your responses with the suggested solution found in the solution to LE-1, (Appendix B).
 - If your response does not agree with the answer in the solution discussion, review the lesson material.
-

ELO 6

Action:	Discuss MRE 315, Probable Cause Searches,
Conditions:	as a first sergeant in a classroom environment, given SH-1 and SH-2,
Standard:	Discussed MRE 315, Probable Cause Searches IAW SH-2.

LS/A 1, ELO 6 To complete the learning activity, you must--

- Read ELO 6 above.
- Read extracts from Student Handout 2, Appendix C.
- Complete questions 10 and 11, LE-1, Appendix B.
- Compare your responses with the suggested solution found in the solution to LE-1, (Appendix B).
- If your response does not agree with the answer in the solution discussion, review the lesson material.

ELO 7

Action:	Discuss MRE Rule 316, Seizure,
Conditions:	as a first sergeant in a classroom environment, given SH-1 and SH-2,
Standard:	Discussed MRE Rule 316, Seizure IAW SH-2.

LS/A 1, ELO 7 To complete the learning activity, you must--

- Read ELO 7 above.
- Read extracts from Student Handout 2, Appendix C.
- Complete question 12, LE-1, Appendix B.
- Compare your responses with the suggested solution found in the solution to LE-1, (Appendix B).
- If your response does not agree with the answer in the solution discussion, review the lesson material.

SECTION IV SUMMARY

**Review/
Summarize
Lesson**

The purpose of this lesson was to acquaint you with the Manual for Courts-Martial (MCM). Through the subjects we discussed and the research you accomplished, you can see how involved military law and the Manual for Courts-Martial can get. The best advice we can give you is, before giving advice or pressing an issue concerning military law, contact your local JAG officer.

**Check on
Learning**

The lesson exercise you completed in Appendix B will serve as the check on learning for this lesson.

**Transition to
Next Lesson**

None

SECTION V STUDENT EVALUATION

Testing Requirements	Before entering phase II FSC-TATS, you will receive the end of Phase I Performance Examination that will include questions based on material in this lesson. On that examination, you must answer at least 70% of the questions correctly to achieve a GO.
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SECTION VI QUESTIONNAIRE

Directions Complete the following actions:

- Enter your name, your rank, and the date you complete this questionnaire.

Name:	Rank:	Date:
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- Answer items 1 through 6 below.
- Fold the questionnaire, so the address for USASMA is visible.
- Print your return address, add postage, and mail.

Note: Your response to this questionnaire will assist the Academy in refining and improving this course. When completing the questionnaire, answer each question frankly. Your assistance helps build and maintain the best curriculum possible.

Item 1 Do you feel you have mastered the learning objectives of this lesson?

Item 2 Was the material covered in this lesson new to you?

Item 3 Which parts of this lesson were most helpful to you in learning the objectives?

Item 4 How could we improve the format of this lesson?

Item 5 How could we improve the content of this lesson?

Item 6 Do you have additional questions or comments? If you do please list them here. You may add additional pages if necessary.

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Appendix B

Index of Lesson Exercises and Solutions

**This Appendix
Contains**

This Appendix contains the items listed in this table--

Title/Synopsis	Page(s)
Lesson Exercise 1, Manual for Courts-Martial	LE-1-1
Solution/Discussion LE-1	SLE-1-1 thru SLE-1-3

LESSON EXERCISE 1
(Self-Graded)
Manual for Courts-Martial

Overview: Before completing this lesson exercise, study student handout. This lesson exercise begins with a review identifying the items located in the index SH-1.

ELO 1: Determine how to locate information in the Manual for Courts-Martial (MCM).

Item 1. Using the table of contents, what are the parts of the Manual for Courts-Martial?

Item 2. What is the difference between a charge and a specification?

ELO 2: Determine the elements of articles 77 and 79.

Item 3. What two articles of the code in the punitive articles portion are not punitive?

ELO 3: Determine the elements of article 78, 80, 81, and 82.

Item 4. What are the four offenses of solicitation in article 82?

Item 5. What elements does “accessory after the fact” in article 78 consist of?

Item 6. How does the MCM define “attempts” (article 80)?

Item 7. What elements does “conspiracy” consist of?

ELO 4: Discuss Military Rules of Evidence (MRE) Rule 313, Inspections and Inventories in the Armed Forces.

Item 8. According to the MCM, what constitutes an inspection?

ELO 5: Discuss MRE Rule 314, Searches not Requiring Probable Cause.

Item 9. What types of searches do not require probable cause?

ELO 6: Discuss MRE Rule 315, Probable Cause Searches.

Item 10. Who has the power to authorize a search?

Item 11. When does probable cause to search exist?

ELO 7: Discuss MRE Rule 316, Seizure.

Item 12. Who has the power to seize property?

SOLUTION TO LESSON EXERCISE 1

Manual for Courts-Martial

ELO 1: Determine how to locate information in the Manual for Courts-Martial (MCM).

Item 1. Using the table of contents, what are the parts of the manual for courts-martial?

Answer: (1) Part I (Preamble)
(2) Part II (Rules for courts-martial)
(3) Part III (Military rules of evidence)
(4) Part IV (Punitive articles)
(5) Part V (Nonjudicial punishment)

Ref: Appendix C, SH-1 (MCM, Table of Contents)

Item 2. What is the difference between a charge and a specification?

Answer: A charge states the article of the code which the accused violated. A specification is a statement of the essential facts constituting the offense.

Ref: Appendix C, SH-2-1 thru SH-2-2 (MCM Part II, page II-27 and II-28)

ELO 2: Determine the elements of articles 77 and 79.

Item 3. What two articles of the code in the punitive articles portion are not punitive?

Answer: Article 77 (Principals) and Article 79 (Lesser included offenses).

Ref: Appendix C, SH-2-8 thru SH-2-11 (MCM, Part IV, page IV-1 thru IV-4)

ELO 3: Determine the elements of article 78, 80, 81, and 82.

Item 4. What are the four offenses of solicitation in article 82?

Answer: (1) To desert.
(2) To mutiny.
(3) To commit an act of misbehavior before the enemy.
(4) To commit an act of sedition.

Ref: Appendix C, SH-2-13 (MCM article 82, page IV-7)

Item 5. What elements does “accessory after the fact” in article 78 consist of?

Answer: (1) That an offense punishable by the code was committed by a certain person;
(2) That the accused knew that this person had committed such offense;
(3) That thereafter the accused received, comforted, or assisted the offender; and
(4) That the accused did so for the purpose of hindering or preventing the apprehension, trial, or punishment of the offender.

Ref: Appendix C, SH-2-9 (MCM article 78, page IV-2)

Item 6 How does the MCM define “attempts” (article 80)?

Answer: An act done with specific intent to commit an offense, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense.

Ref: Appendix C, SH-2-11 (MCM article 80, page IV-4)

Item 7. What elements does “conspiracy” consist of (Article 81)?

Answer: “(1) That the accused entered into an agreement with one or more persons to commit an offense under the code; and
(2) That, while the agreement continued to exist, and while the accused remained a party to the agreement, the accused or at least one of the co-conspirators performed an overt act for the purpose of bringing about the object of the conspiracy.”

Ref: Appendix C, SH-2-12 (MCM article 81, page IV-5)

ELO 4: Discuss Military Rules of Evidence (MRE) Rule 313, inspections and inventories in the armed forces.

Item 8. According to the MCM, what constitutes an inspection?

Answer: An “inspection” is an examination of the whole or part of a unit, organization, installation, vessel, aircraft, or vehicle, including an examination conducted at entrance and exit points, conducted as an incident of command the primary purpose of which is to determine and ensure the security, military fitness, or good order and discipline of the unit, organization, installation, vessel, aircraft, or vehicle..... an inventory is a form of inspection. “Inspections and inventories shall be conducted in a reasonable fashion and shall comply with military rules of evidence 312, if applicable.”

Ref: Appendix C, SH-2-3 (MCM Rule 313, page III-12)

ELO 5: Discuss MRE Rule 314, searches not requiring probable cause.

Item 9. What types of searches do not require probable cause?

Answer: (1) Border searches.
(2) Searches upon entry to or exit from United States installations, aircraft, and vessels abroad.
(3) Searches of government property.
(4) Consent searches.
(5) Searches incident to a lawful stop.
(6) Searches incident to a lawful apprehension.
(7) Searches within jails, confinement facilities, or similar facilities.
(8) Emergency searches to save life or for related purposes.
(9) Searches of open fields or woodlands.
(10) Other searches.

Ref: Appendix C, SH-2-3 thru SH-2-4 (MCM Rule 314, page III-12 thru III-14)

ELO 6: Discuss MRE Rule 315, probable cause searches.

Item 10. Who has the power to authorize a search?

Answer: The commander or a military judge.

Ref: Appendix C, SH-2-5 (MCM Rule 315, page III-14)

Item 11. When does probable cause to search exist?

Answer: Probable cause to search exists when there is a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched.

Ref: Appendix C, SH-2-6 (MCM Rule 315, page III-15)

ELO 7: Discuss MRE Rule 316, seizure.

Item 12. Who has the power to seize property?

Answer: Any commissioned officer, warrant officer, petty officer, noncommissioned officer, and when in the execution of guard or police duties, any criminal investigator, member of the Air Force security police, military police, or shore patrol, or person designated by proper authority to perform guard or police duties, or any agent of any such person, may conduct or authorize a search when a search authorization has been granted under this rule or a search would otherwise be proper under subdivision (g).

Ref: Appendix C, SH-2-7 (MCM, Rule 316, III-16)

Appendix C

Index of Student Handouts

**This Appendix
Contains**

This Appendix contains the items listed in this table--

Title/Synopsis	Pages
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(d) *National security matters.* If a commander not authorized to convene general courts-martial finds that an offense warrants trial by court-martial, but believes that trial would be detrimental to the prosecution of a war or harmful to national security, the matter shall be forwarded to the general court-martial convening authority for action under R.C.M. 407(b).

Discussion

Rule 307. Preferral of charges

(a) *Who may prefer charges.* Any person subject to the code may prefer charges.

Discussion

No person may be ordered to prefer charges to which that person is unable to make truthfully the required oath. See Article 30(a) and subsection (b) of this rule. A person who has been the accuser or nominal accuser (*see* Article 1(9)) may not also serve as the convening authority of a general or special court-martial to which the charges are later referred. *See* Articles 22(b) and 23(b); R.C.M. 601; however, *see* R.C.M. 1302(b) (summary court-martial convening authority is not disqualified by being the accuser). A person authorized to dispose of offenses (*see* R.C.M. 306(a); 401—404 and 407) should not be ordered to prefer charges when this would disqualify that person from exercising that person's authority or would improperly restrict that person's discretion to act on the case. *See* R.C.M. 104 and 504(c).

Charges may be preferred against a person subject to trial by court-martial at any time but should be preferred without unnecessary delay. *See* the statute of limitations prescribed by Article 43. Preferral of charges should not be unnecessarily delayed. When a good reason exists—as when a person is permitted to continue a course of conduct so that a ringleader or other conspirators may also be discovered or when a suspected counterfeiter goes uncharged until guilty knowledge becomes apparent—a reasonable delay is permissible. However, *see* R.C.M. 707 concerning speedy trial requirements.

(b) *How charges are preferred, oath.* A person who prefers charges must:

(1) Sign the charges and specifications under oath before a commissioned officer of the armed forces authorized to administer oaths; and

(2) State that the signer has personal knowledge of or has investigated the matters set forth in the charges and specifications and that they are true in fact to the best of that person's knowledge and belief.

See Article 136 for authority to administer oaths. The following form may be used to administer the oath:

“You (swear) (affirm) that you are a person subject to the Uniform Code of Military Justice, that you have personal knowledge of or have investigated the matters set forth in the foregoing charge(s) and specification(s), and that the same are true in fact to the best of your knowledge and belief. (So help you God.)”

The accuser's belief may be based upon reports of others in whole or in part.

(c) *How to allege offenses.*

(1) *In general.* The format of charge and specification is used to allege violations of the code.

Discussion

See Appendix 4 for a sample of a Charge Sheet (DD Form 458).

(2) *Charge.* A charge states the article of the code, law of war, or local penal law of an occupied territory which the accused is alleged to have violated.

Discussion

The particular subdivision of an article of the code (for example, Article 118(1)) should not be included in the charge. When there are numerous infractions of the same article, there will be only one charge, but several specifications thereunder. There may also be several charges, but each must allege a violation of a different article of the code. For violations of the law of war, *see* (D) below.

(A) *Numbering charges.* If there is only one charge, it is not numbered. When there is more than one charge, each charge is numbered by a Roman numeral.

(B) *Additional charges.* Charges preferred after others have been preferred are labeled “additional charges” and are also numbered with Roman numerals, beginning with “I” if there is more than one additional charge. These ordinarily relate to offenses not known at the time or committed after the original charges were preferred. Additional charges do not require a separate trial if incorporated in the trial of the original charges before arraignment. *See* R.C.M. 601(e)(2).

(C) *Preemption.* An offense specifically defined by Articles 81 through 132 may not be alleged as a violation of Article 134. *See* paragraph 60c(5)(a) of Part IV. *But see* subsection (d) of this rule.

(D) *Charges under the law of war.* In the case of a person subject to trial by general court-martial for violations of the law of war (*see* Article 18), the

charge should be; “Violation of the Law of War”;
or “Violation of _____

“referring to the local penal
law of the occupied territory. *See* R.C.M.
201(f)(1)(B). *But see* subsection (d) of this rule.
Ordinarily persons subject to the code should be
charged with a specific violation of the code
rather than a violation of the law of war.

(3) *Specification.* A specification is a plain, concise, and definite statement of the essential facts constituting the offense charged. A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication. No particular format is required.

Discussion

How to draft specifications.

- (A) *Sample specifications.* Before drafting a specification, the drafter should read the pertinent provisions of Part IV, where the elements of proof of various offenses and forms for specifications appear.
- (B) *Numbering specifications.* If there is only one specification under a charge it is not numbered. When there is more than one specification under any charge, the specifications are numbered in Arabic numerals. The term “additional” is not used in connection with the specifications under an additional charge.
- (C) *Name and description of the accused.*
 - (i) *Name.* The specification should state the accused’s full name: first name, middle name or initial, last name. If the accused is known by more than one name, the name acknowledged by the accused should be used. If there is no such acknowledgment, the name believed to be the true name should be listed first, followed by all known aliases. For example: Seaman John P. Smith, U.S. Navy, alias Lt. Robert R. Brown, U.S. Navy.
 - (ii) *Military association.* The specification should state the accused’s rank or grade. If the rank or grade of the accused has changed since the date of an alleged offense, and the change is pertinent to the offense charged, the accused should be identified by the present rank or grade followed by rank or grade on the date of the alleged offense. For example: In that Seaman _____ then Seaman Apprentice _____, etc.
 - (iii) *Social security number or service number.* The social security number or service number of an accused should not be stated in the specification.
 - (iv) *Basis of personal jurisdiction.*
 - (a) *Military members on active duty.* Ordinarily, no allegation of the accused’s armed force or unit or organization is necessary for military members on active duty.
 - (b) *Persons subject to the code under Article 2(a), subsections (3) through (12), or subject to trial by court-martial under Articles 3 or 4.* The specification should

describe the accused’s armed force, unit or organization, position, or status which will indicate the basis of jurisdiction. For example: John Jones, (a person employed by and serving with the U.S. Army in the field in time of war) (a person convicted of having obtained a fraudulent discharge), etc.

(D) Date and time of offense

(i) *In general.* The date of the commission of the offense charged should be stated in the specification with sufficient precision to identify the offense and enable the accused to understand what particular act or omission to defend against.

(ii) *Use of “on or about.”* In alleging the date of the offense it is proper to allege it as “on or about” a specified day.

(iii) *Hour.* The exact hour of the offense is ordinarily not alleged except in certain absence offenses. When the exact time is alleged, the 24-hour clock should be used. The use of “at or about” is proper.

(iv) *Extended periods.* When the acts specified extend(s) over a considerable period of time it is proper to allege it (or them) as having occurred, for example, “from about 15 June 1983 to about 4 November 1983,” or “did on divers occasions between 15 June 1983 and 4 November 1983.”

(B) *Place of offense.* The place of the commission of the offense charged should be stated in the specification with sufficient precision to identify the offense and enable the accused to understand the particular act or omission to defend against. In alleging the place of the offense, it is proper to allege it as “at or near” a certain place if the exact place is uncertain.

(F) Subject-matter jurisdiction allegations.

Pleading the accused’s rank or grade along with the proper elements of the offense normally will be sufficient to establish subject-matter jurisdiction.

(G) Description of offense.

(i) *Elements.* The elements of the offense must be alleged, either expressly or by necessary implication. If a specific intent, knowledge, or state of mind is an element of the offense, it must be alleged.

(ii) *Words indicating criminality.* If the alleged act is not itself an offense but is made an offense either by applicable statute (including Articles 133 and 134), or regulation or custom having the effect of law, then words indicating criminality such as “wrongfully,” “unlawfully,” or “without authority” (depending upon the nature of the offense) should be used to describe the accused’s acts.

(iii) *Specificity.* The specification should be sufficiently specific to inform the accused of the conduct charged, to enable the accused to prepare a defense, and to protect the accused against double jeopardy. Only those facts that make the accused’s conduct criminal ordinarily should be alleged. Specific evidence supporting the allegations ordinarily should not be included in the specifications.

(iv) *Duplicity.* One specification should not allege more than one offense, either conjunctively (the accused “lost and destroyed”) or alternatively (the accused “lost or destroyed”). However, if two acts or a series of acts constitute one offense, they may be alleged conjunctively. *See* R.C.M. 906(b)(5).

(H) Other considerations in drafting specifications.

(i) *Principals.* All principals are charged as if each

Rule 313. Inspections and inventories in the armed forces

(a) *General rule.* Evidence obtained from inspections and inventories in the armed forces conducted in accordance with this rule is admissible at trial when relevant and not otherwise inadmissible under these rules.

(b) *Inspections.* An “inspection” is an examination of the whole or part of a unit, organization, installation, vessel, aircraft, or vehicle, including an examination conducted at entrance and exit points, conducted as an incident of command the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit, organization, installation, vessel, aircraft, or vehicle. An inspection may include but is not limited to an examination to determine and to ensure that any or all of the following requirements are met: that the command is properly equipped, functioning properly, maintaining proper standards of readiness, sea or airworthiness, sanitation and cleanliness, and that personnel are present, fit, and ready for duty. An inspection also includes an examination to locate and confiscate unlawful weapons and other contraband. An order to produce body fluids, such as urine, is permissible in accordance with this rule. An examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings is not an inspection within the meaning of this rule. If a purpose of an examination is to locate weapons or contraband, and if: (1) the examination was directed immediately following a report of a specific offense in the unit, organization, installation, vessel, aircraft, or vehicle and was not previously scheduled; (2) specific individuals are selected for examination; or (3) persons examined are subjected to substantially different intrusions during the same examination, the prosecution must prove by clear and convincing evidence that the examination was an inspection within the meaning of this rule. Inspections shall be conducted in a reasonable fashion and shall comply with Mil. R. Evid. 312, if applicable. Inspections may utilize any reasonable natural or technological aid and may be conducted with or without notice to those inspected. Unlawful weapons, contraband, or other evidence of crime located during an inspection may be seized.

(c) *Inventories.* Unlawful weapons, contraband, or

other evidence of crime discovered in the process of an inventory, the primary purpose of which is administrative in nature, may be seized. Inventories shall be conducted in a reasonable fashion and shall comply with Mil. R. Evid. 312, if applicable. An examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings is not an inventory within the meaning of this rule.

Rule 314. Searches not requiring probable cause

(a) *General rule.* Evidence obtained from reasonable searches not requiring probable cause conducted pursuant to this rule is admissible at trial when relevant and not otherwise inadmissible under these rules.

(b) *Border searches.* Border searches for customs or immigration purposes may be conducted when authorized by Act of Congress.

(c) *Searches upon entry to or exit from United States installations, aircraft, and vessels abroad.* In addition to the authority to conduct inspections under Mil. R. Evid. 313(b), a commander of a United States military installation, enclave, or aircraft on foreign soil, or in foreign or international airspace, or a United States vessel in foreign or international waters, may authorize appropriate personnel to search persons or the property of such persons upon entry to or exit from the installation, enclave, aircraft, or vessel to ensure the security, military fitness, or good order and discipline of the command. Such searches may not be conducted at a time or in a manner contrary to an express provision of a treaty or agreement to which the United States is a party. Failure to comply with a treaty or agreement, however, does not render a search unlawful within the meaning of Mil. R. Evid. 311. A search made for the primary purpose of obtaining evidence for use in a trial by court-martial or other disciplinary proceeding is not authorized by this subdivision.

(d) *Searches of government property.* Government property may be searched under this rule unless the person to whom the property is issued or assigned has a reasonable expectation of privacy therein at the time of the search. Under normal circumstances, a person does not have a reasonable expectation of privacy in government property that is not issued for personal use. Wall or floor lockers in living quarters issued for the purpose of storing personal possessions-

sions normally are issued for personal use; but the determination as to whether a person has a reasonable expectation of privacy in government property issued for personal use depends on the facts and circumstances at the time of the search.

(e) *Consent searches.*

(1) *General rule.* Searches may be conducted of any person or property with lawful consent.

(2) *Who may consent.* A person may consent to a search of his or her person or property, or both, unless control over such property has been given to another. A person may grant consent to search property when the person exercises control over that property.

(3) *Scope of consent.* Consent may be limited in any way by the person granting consent, including limitations in terms of time, place, or property and may be withdrawn at any time.

(4) *Voluntariness.* To be valid, consent must be given voluntarily. Voluntariness is a question to be determined from all the circumstances. Although a person's knowledge of the right to refuse to give consent is a factor to be considered in determining voluntariness, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent. Mere submission to the color of authority of personnel performing law enforcement duties or acquiescence in an announced or indicated purpose to search is not a voluntary consent.

(5) *Burden of proof.* Consent must be shown by clear and convincing evidence. The fact that a person was in custody while granting consent is a factor to be considered in determining the voluntariness of consent, but it does not affect the burden of proof.

(f) *Searches incident to a lawful stop.*

(1) *Stops.* A person authorized to apprehend under R.C.M. 302(b) and others performing law enforcement duties may stop another person temporarily when the person making the stop has information or observes unusual conduct that leads him or her reasonably to conclude in light of his or her experience that criminal activity may be afoot. The purpose of the stop must be investigatory in nature.

(2) *Frisks.* When a lawful stop is performed, the person stopped may be frisked for weapons when that person is reasonably believed to be armed and presently dangerous. Contraband or evidence located in the process of a lawful frisk may be seized.

(3) *Motor vehicles.* When a person lawfully stopped is the driver or a passenger in a motor vehicle, the passenger compartment of the vehicle may be searched for weapons if the official who made the stop has a reasonable belief that the person stopped is dangerous and that the person stopped may gain immediate control of a weapon.

(g) *Searches incident to a lawful apprehension.*

(1) *General rule.* A person who has been lawfully apprehended may be searched.

(2) *Search for weapons and destructible evidence.* A search may be conducted for weapons or destructible evidence, in the area within the immediate control of a person who has been apprehended. The area within the person's "immediate control" is the area which the individual searching could reasonably believe that the person apprehended could reach with a sudden movement to obtain such property; provided, that the passenger compartment of an automobile, and containers within the passenger compartment may be searched as a contemporaneous incident of the apprehension of an occupant of the automobile, regardless whether the person apprehended has been removed from the vehicle.

(3) *Examination for other persons.*

(A) When an apprehension takes place at a location in which other persons might be present who might endanger those conducting the apprehension and others in the area of the apprehension, a reasonable examination may be made of the general area in which such other persons might be located. A reasonable examination under this rule is permitted if the apprehending officials have a reasonable suspicion based on specific and articulable facts that the area to be examined harbors an individual posing a danger to those in the area of the apprehension.

(B) Apprehending officials may, incident to apprehension, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of apprehension from which an attack could be immediately launched.

(h) *Searches within jails, confinement facilities, or similar facilities.* Searches within jails, confinement facilities, or similar facilities may be authorized by persons with authority over the institution.

(i) *Emergency searches to save life or for related purposes.* In emergency circumstances to save life or for a related purpose, a search may be conducted of

persons or property in a good faith effort to render immediate medical aid, to obtain information that will assist in the rendering of such aid, or to prevent immediate or ongoing personal injury.

(j) *Searches of open fields or woodlands.* A search of open fields or woodlands is not an unlawful search within the meaning of Mil. R. Evid. 311.

(k) *Other searches.* A search of a type not otherwise included in this rule and not requiring probable cause under Mil. R. Evid. 315 may be conducted when permissible under the Constitution of the United States as applied to members of the armed forces.

Rule 315. Probable cause searches

(a) *General rule.* Evidence obtained from searches requiring probable cause conducted in accordance with this rule is admissible at trial when relevant and not otherwise inadmissible under these rules.

(b) *Definitions.* As used in these rules:

(1) *Authorization to search.* An “authorization to search” is an express permission, written or oral, issued by competent military authority to search a person or an area for specified property or evidence or for a specific person and to seize such property, evidence, or person. It may contain an order directing subordinate personnel to conduct a search in a specified manner.

(2) *Search warrant.* A “search warrant” is an express permission to search and seize issued by competent civilian authority.

(c) *Scope of authorization.* A search authorization may be issued under this rule for a search of:

(1) *Persons.* The person of anyone subject to military law or the law of war wherever found;

(2) *Military property.* Military property of the United States or of nonappropriated fund activities of an armed force of the United States wherever located;

(3) *Persons and property within military control.* Persons or property situated on or in a military installation, encampment, vessel, aircraft, vehicle, or any other location under military control, wherever located; or

(4) *Nonmilitary property within a foreign country.*

(A) Property owned, used, occupied by, or in the possession of an agency of the United States other than the Department of Defense when situated in a foreign country. A search of such property may not be conducted without the

concurrence of an appropriate representative of the agency concerned. Failure to obtain such concurrence, however, does not render a search unlawful within the meaning of Mil. R. Evid. 311.

(B) Other property situated in a foreign country. If the United States is a party to a treaty or agreement that governs a search in a foreign country, the search shall be conducted in accordance with the treaty or agreement. If there is no treaty or agreement, concurrence should be obtained from an appropriate representative of the foreign country with respect to a search under paragraph (4)(B) of this subdivision. Failure to obtain such concurrence or noncompliance with a treaty or agreement, however, does not render a search unlawful within the meaning of Mil. R. Evid. 311.

(d) *Power to authorize.* Authorization to search pursuant to this rule may be granted by an impartial individual in the following categories:

(1) *Commander.* A commander or other person serving in a position designated by the Secretary concerned as either a position analogous to an officer in charge or a position of command, who has control over the place where the property or person to be searched is situated or found, or, if that place is not under military control, having control over persons subject to military law or the law of war; or

(2) *Military judge.* A military judge or magistrate if authorized under regulations prescribed by the Secretary of Defense or the Secretary concerned. An otherwise impartial authorizing official does not lose the character merely because he or she is present at the scene of a search or is otherwise readily available to persons who may seek the issuance of a search authorization; nor does such an official lose impartial character merely because the official previously and impartially authorized investigative activities when such previous authorization is similar in intent or function to a pretrial authorization made by the United States district courts.

(e) *Power to search.* Any commissioned officer, warrant officer, petty officer, noncommissioned officer, and, when in the execution of guard or police duties, any criminal investigator, member of the Air Force security police, military police, or shore patrol, or person designated by proper authority to perform guard or police duties, or any agent of any

such person, may conduct or authorize a search when a search authorization has been granted under this rule or a search would otherwise be proper under subdivision (g).

(f) Basis for Search authorizations.

(1) *Probable cause requirement.* A search authorization issued under this rule must be based upon probable cause.

(2) *Probable cause determination.* Probable cause to search exists when there is a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched. A search authorization may be based upon hearsay evidence in whole or in part. A determination of probable cause under this rule shall be based upon any or all of the following:

(A) Written statements communicated to the authorizing officer;

(B) Oral statements communicated to the authorizing official in person, via telephone, or by other appropriate means of communication; or

(C) Such information as may be known by the authorizing official that would not preclude the officer from acting in an impartial fashion. The Secretary of Defense or the Secretary concerned may prescribe additional requirements.

(g) *Exigencies.* A search warrant or search authorization is not required under this rule for a search based on probable cause when:

(1) *Insufficient time.* There is a reasonable belief that the delay necessary to obtain a search warrant or search authorization would result in the removal, destruction, or concealment of the property or evidence sought;

(2) *Lack of communications.* There is a reasonable military operational necessity that is reasonably believed to prohibit or prevent communication with a person empowered to grant a search warrant or authorization and there is a reasonable belief that the delay necessary to obtain a search warrant or search authorization would result in the removal, destruction, or concealment of the property or evidence sought;

(3) *Search of operable vehicle.* An operable vehicle is to be searched, except in the circumstances where a search warrant or authorization is required by the Constitution of the United States, this Manual, or these rules; or

(4) *Not required by the Constitution.* A search

warrant or authorization is not otherwise required by the Constitution of the United States as applied to members of the armed forces. For purpose of this rule, a vehicle is “operable” unless a reasonable person would have known at the time of search that the vehicle was not functional for purposes of transportation.

(h) Execution.

(1) *Notice.* If the person whose property is to be searched is present during a search conducted pursuant to a search authorization granted under this rule, the person conducting the search should when possible notify him or her of the act of authorization and the general substance of the authorization. Such notice may be made prior to or contemporaneously with the search. Failure to provide such notice does not make a search unlawful within the meaning of Mil. R. Evid. 311.

(2) *Inventory.* Under regulations prescribed by the Secretary concerned, and with such exceptions as may be authorized by the Secretary, an inventory of the property seized shall be made at the time of a seizure under this rule or as soon as practicable thereafter. At an appropriate time, a copy of the inventory shall be given to a person from whose possession or premises the property was taken. Failure to make an inventory, furnish a copy thereof, or otherwise comply with this paragraph does not render a search or seizure unlawful within the meaning of Mil. R. Evid. 311.

(3) *Foreign searches.* Execution of a search authorization outside the United States and within the jurisdiction of a foreign nation should be in conformity with existing agreements between the United States and the foreign nation.

Noncompliance with such an agreement does not make an otherwise lawful search unlawful.

(4) *Search warrants.* Any civilian or military criminal investigator authorized to request search warrants pursuant to applicable law or regulation is authorized to serve and execute search warrants. The execution of a search warrant affects admissibility only insofar as exclusion of evidence is required by the Constitution of the United States or an applicable Act of Congress.

Rule 316. Seizures

(a) *General rule.* Evidence obtained from seizures

conducted in accordance with this rule is admissible at trial if the evidence was not obtained as a result of an unlawful search and if the evidence is relevant and not otherwise inadmissible under these rules.

(b) *Seizure of property.* Probable cause to seize property or evidence exists when there is a reasonable belief that the property or evidence is an unlawful weapon, contraband, evidence of crime, or might be used to resist apprehension or to escape.

(c) *Apprehension.* Apprehension is governed by R.C.M. 302.

(d) *Seizure of property or evidence.*

(1) *Abandoned property.* Abandoned property may be seized without probable cause and without a search warrant or search authorization. Such seizure may be made by any person.

(2) *Consent.* Property or evidence may be seized with consent consistent with the requirements applicable to consensual searches under Mil. R. Evid. 314.

(3) *Government property.* Government property may be seized without probable cause and without a search warrant or search authorization by any person listed in subdivision (e), unless the person to whom the property is issued or assigned has a reasonable expectation of privacy therein, as provided in Mil. R. Evid. 314(d), at the time of the seizure.

(4) *Other property.* Property or evidence not included in paragraph (1)-(3) may be seized for use in evidence by any person listed in subdivision (e) if:

- (A) *Authorization.* The person is authorized to seize the property or evidence by a search warrant or a search authorization under Mil. R. Evid. 315;

(B) *Exigent circumstances.* The person has probable cause to seize the property or evidence and under Mil. R. Evid. 315(g) a search warrant or search authorization is not required; or

(C) *Plain view.* The person while in the course of otherwise lawful activity observes in a reasonable fashion property or evidence that the person has probable cause to seize.

(5) *Temporary detention.* Nothing in this rule shall prohibit temporary detention of property on less than probable cause when authorized under the Constitution of the United States.

(e) *Power to seize.* Any commissioned officer, warrant officer, petty officer, noncommissioned officer, and, when in the execution of guard or

police duties, any criminal investigator, member of the Air Force security police, military police, or shore patrol, or individual designated by proper authority to perform guard or police duties, or any agent of any such person, may seize property pursuant to this rule.

(f) *Other seizures.* A seizure of a type not otherwise included in this rule may be made when permissible under the Constitution of the United States as applied to members of the armed forces.

Rule 317. Interception of wire and oral communications

(a) *General rule.* Wire or oral communications constitute evidence obtained as a result of an unlawful search or seizure within the meaning of Mil. R. Evid. 311 when such evidence must be excluded under the Fourth Amendment to the Constitution of the United States as applied to members of the armed forces or if such evidence must be excluded under a statute applicable to members of the armed forces.

(b) *Authorization for judicial applications in the United States.* Under 18 U.S.C. § 2516(1), the Attorney General, or any Assistant Attorney General specially designated by the Attorney General may authorize an application to a federal judge of competent jurisdiction for, and such judge may grant in conformity with 18 U.S.C. § 2518, an order authorizing or approving the interception of wire or oral communications by the Department of Defense, the Department of Transportation, or any Military Department for purposes of obtaining evidence concerning the offenses enumerated in 18 U.S.C. § 2516(1), to the extent such offenses are punishable under the Uniform Code of Military Justice.

(c) *Regulations.* Notwithstanding any other provision of these rules, members of the armed forces or their agents may not intercept wire or oral communications for law enforcement purposes unless such interception:

(1) takes place in the United States and is authorized under subdivision (b);

(2) takes place outside the United States and is authorized under regulations issued by the Secretary of Defense or the Secretary concerned; or

(3) is authorized under regulations issued by the Secretary of Defense or the Secretary concerned and is not unlawful under 18 U.S.C. § 2511.

PART IV PUNITIVE ARTICLES

Discussion

Paragraphs 1 and 2 discuss the two articles of the code that are located in the punitive article subchapter of the code, but which are not punitive as such: Article 77, principals; and Article 79, lesser included offenses.

R.C.M. 307 prescribes rules for preferral of charges. The discussion under that rule explains how to allege violations under the code using the format of charge and specification.

Beginning with paragraph 3, the punitive articles of the code are discussed using the following sequence:

- a. Text of the article
- b. Elements of the offense or offenses
- c. Explanation
- d. Lesser included offenses
- e. Maximum punishment
- f. Sample specifications

The term “elements,” as used in Part IV, includes both the statutory elements of the offense and any aggravating factors listed under the President’s authority which increases the maximum permissible punishment when specified aggravating factors are pleaded and proven.

The prescriptions of maximum punishments in subparagraph e of each paragraph of this part must be read in conjunction with R.C.M. 1003, which prescribes additional punishments that may be available and additional limitations on punishments. The sample specifications provided in subparagraph f of each paragraph in this part are guides. The specifications may be varied in form and content as necessary. See R.C.M. 307 for additional guidance.

1. Article 77—Principals

a. *Text.* “Any person punishable under this chapter who—

(1) commits an offense punishable by this chapter, or aids, abets, counsels, commands, or procures its commission; or

(2) causes an act to be done which if directly performed by him would be punishable by this chapter; is a principal.”

b. *Explanation.*

(1) *Purpose.* Article 77 does not define an offense. Its purpose is to make clear that a person need not personally perform the acts necessary to constitute an offense to be guilty of it. A person who aids, abets, counsels, commands, or procures the commission of an offense, or who causes an act to be done which, if done by that person directly, would be an offense is equally guilty of the offense as one who commits it directly, and

may be punished to the same extent.

Article 77 eliminates the common law distinctions between principal in the first degree (“perpetrator”); principal in the second degree (one who aids, counsels, commands, or encourages the commission of an offense and who is present at the scene of the crime—commonly known as an “aider and abettor”); and accessory before the fact (one who aids, counsels, commands, or encourages the commission of an offense and who is not present at the scene of the crime). All of these are now “principals.”

(2) *Who may be liable for an offense.*

(a) *Perpetrator.* A perpetrator is one who actually commits the offense, either by the perpetrator’s own hand, or by causing an offense to be committed by knowingly or intentionally inducing or setting in motion acts by an animate or inanimate agency or instrumentality which result in the commission of an offense. For example, a person who knowingly conceals contraband drugs in an automobile, and then induces another person, who is unaware and has no reason to know of the presence of drugs, to drive the automobile onto a military installation, is, although not present in the automobile, guilty of wrongful introduction of drugs onto a military installation. (On these facts, the driver would be guilty of no crime.) Similarly, if, upon orders of a superior, a soldier shot a person who appeared to the soldier to be an enemy, but was known to the superior as a friend, the superior would be guilty of murder (but the soldier would be guilty of no offense).

(b) *Other Parties.* If one is not a perpetrator, to be guilty of an offense committed by the perpetrator, the person must:

(i) Assist, encourage, advise, instigate, counsel, command, or procure another to commit, or assist, encourage, advise, counsel, or command another in the commission of the offense; and

(ii) Share in the criminal purpose of design.

One who, without knowledge of the criminal venture or plan, unwittingly encourages or renders assistance to another in the commission of an offense is not guilty of a crime. See the parentheticals in the examples in paragraph 1b(2)(a) above. In some circumstances, inaction may make one liable as a party, where there is a duty to act. If a person

(for example, a security guard) has a duty to interfere in the commission of an offense, but does not interfere, that person is a party to the crime ~~~f~~ such a noninterference is intended to and does operate as an aid or encouragement to the actual perpetrator.

(3) *Presence.*

(a) *Not necessary.* Presence at the scene of the crime is not necessary to make one a party to the crime and liable as a principal. For example, one who, knowing that person intends to shoot another person and intending that such an assault be carried out, provides the person with a pistol, is guilty of assault when the offense is committed, even though not present at the scene.

(b) *Not sufficient.* Mere presence at the scene of a crime does not make one a principal unless the requirements of paragraph 1b(2)(a) or (b) have been met.

(4) *Parties whose intent differs from the perpetrator's.* When an offense charged requires proof of a specific intent or particular state of mind as an element, the evidence must prove that the accused had that intent or state of mind, whether the accused is charged as a perpetrator or an "other party" to crime. It is possible for a party to have a state of mind more or less culpable than the perpetrator of the offense. In such a case, the party may be guilty of a more or less serious offense than that committed by the perpetrator. For example, when a homicide is committed, the perpetrator may act in the heat of sudden passion caused by adequate provocation and be guilty of manslaughter, while the party who, without such passion, hands the perpetrator a weapon and encourages the perpetrator to kill the victim, would be guilty of murder. On the other hand, if a party assists a perpetrator in an assault on a person who, known only to the perpetrator, is an officer, the party would be guilty only of assault, while the perpetrator would be guilty of assault on an officer.

(5) *Responsibility for other crimes.* A principal may be convicted of crimes committed by another principal if such crimes are likely to result as a natural and probable consequence of the criminal venture or design. For example, the accused who is a party to a burglary is guilty as a principal not only of the offense of burglary, but also, if the perpetrator kills an occupant in the course of the burglary, of

murder. (see also paragraph 5 concerning liability for offenses committed by co-conspirators.)

(6) *Principals independently liable.* One may be a principal, even if the perpetrator is not identified or prosecuted, or is acquitted.

(7) *Withdrawal.* A person may withdraw from a common venture or design and avoid liability for any offenses committed after the withdrawal. To be effective, the withdrawal must meet the following requirements:

(a) It must occur before the offense is committed;

(b) The assistance, encouragement, advice, instigation, counsel, command, or procurement given by the person must be effectively countermanded or negated; and

(c) The withdrawal must be clearly communicated to the would-be perpetrators or to appropriate law enforcement authorities in time for the perpetrators to abandon the plan or for law enforcement authorities to prevent the offense.

2. Article 78—Accessory after the fact

a. *Text.* "Any person subject to this chapter who, knowing that an offense punishable by this chapter has been committed, receives, comforts, or assists the offender in order to hinder or prevent his apprehension, trial, or punishment shall be punished as a court-martial may direct."

b. *Elements.*

(1) That an offense punishable by the code was committed by a certain person;

(2) That the accused knew that this person had committed such offense;

(3) That thereafter the accused received, comforted, or assisted the offender; and

(4) That the accused did so for the purpose of hindering or preventing the apprehension, trial, or punishment of the offender.

c. *Explanation.*

(1) *In general.* The assistance given a principal by an accessory after the fact is not limited to assistance designed to effect the escape or concealment of the principal, but also includes acts performed to conceal the commission of the offense by the principal (for example, by concealing evidence of the offense).

(2) *Failure to report offense.* The mere failure to

report a known offense will not make one an accessory after the fact. Such failure may violate a general order or regulation, however, and thus constitute an offense under Article 92. *See* paragraph 16. If the offense involved is a serious offense, failure to report it may constitute the offense of misprision of a serious offense, under Article 134. *See* paragraph 95.

(3) *Offense punishable by the code.* The term “offense punishable by this chapter” in the text of the article means any offense described in the code.

(4) *Status of principal.* The principal who committed the offense in question need not be subject to the code, but the offense committed must be punishable by the code.

(5) *Conviction or acquittal of principal.* The prosecution must prove that a principal committed the offense to which the accused is allegedly an accessory after the fact. However, evidence of the conviction or acquittal of the principal in a separate trial is not admissible to show that the principal did or did not commit the offense. Furthermore, an accused may be convicted as an accessory after the fact despite the acquittal in a separate trial of the principal whom the accused allegedly comforted, received, or assisted.

(6) *Accessory after the fact not a lesser included offense.* The offense of being an accessory after the fact is not a lesser included offense of the primary offense.

(7) *Actual knowledge.* Actual knowledge is required but may be proved by circumstantial evidence.

d. *Lesser included offense.* Article 80- attempts

e. *Maximum punishment.* Any person subject to the code who is found guilty as an accessory after the fact to an offense punishable by the code shall be subject to the maximum punishment authorized for the principal offense, except that in no case shall the death penalty nor more than one-half of the maximum confinement authorized for that offense be adjudged, nor shall the period of confinement exceed 10 years in any case, including offenses for which life imprisonment may be adjudged.

f. *Sample specification.*

In that (personal jurisdiction data), knowing that (at/on board—location), on or about _____ 20 _____ had committed an offense punishable by the Uniform Code of Military Justice, to wit: did, (at/on board—location)

(subject-matter jurisdiction data, if required), on or about _____ 20, in order to (hinder) (prevent) the (apprehension) (trial) (punishment) of the said (receive) (comfort) (assist) the said by

3. Article 79—Conviction of lesser included offenses

a. *Text.* “An accused may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein.”

b. *Explanation.*

(1) *In general.* A lesser offense is included in a charged offense when the specification contains allegations which either expressly or by fair implication put the accused on notice to be prepared to defend against it in addition to the offense specifically charged. This requirement of notice may be met when:

(a) All of the elements of the lesser offense are included in the greater offense, and the common elements are identical (for example, larceny as a lesser included offense of robbery);

(b) All of the elements of the lesser offense are included in the greater offense, but one or more elements is legally less serious (for example, housebreaking as a lesser included offense of burglary); or

(c) All of the elements of the lesser offense are included and necessary parts of the greater offense, but the mental element is legally less serious (for example, wrongful appropriation as a lesser included offense of larceny). The notice requirement may also be met, depending on the allegations in the specification, even though an included offense requires proof of an element not required in the offense charged. For example, assault with a dangerous weapon may be included in a robbery.

(2) *Multiple lesser included offenses.* When the offense charged is a compound offense comprising two or more included offenses, an accused may be found guilty of any or all of the offenses included in the offense charged. For example, robbery includes both larceny and assault. Therefore, in a proper case,

a court-martial may find an accused not guilty of robbery, but guilty of wrongful appropriation and assault.

(3) *Findings of guilty to a lesser included offense.* A court-martial may find an accused not guilty of the offense charged, but guilty of a lesser included offense by the process of exception and substitution. The court-martial may except (that is, delete) the words in the specification that pertain to the offense charged and, if necessary, substitute language appropriate to the lesser included offense. For example, the accused is charged with murder in violation of Article 118, but found guilty of voluntary manslaughter in violation of Article 119. Such a finding may be worded as follows:

Of the Specification: Guilty, except the word “murder,” substituting therefor the words “willfully and unlawfully kill”, of the excepted word, not guilty, of the substituted words, guilty.

Of the Charge: Not guilty, but guilty of a violation of Article 119.

If a court-martial finds an accused guilty of a lesser included offense, the finding as to the charge shall state a violation of the specific punitive article violated and not a violation of Article 79.

(4) *Specific lesser included offenses.* Specific lesser included offenses, if any, are listed for each offense discussed in this Part, but the lists are not all-inclusive.

4. Article 80—Attempts

a. Text.

“(a) An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense.

(b) Any person subject to this chapter who attempts to commit any offense punishable by this chapter shall be punished as a court-martial may direct, unless otherwise specifically prescribed.

(c) Any person subject to this chapter may be convicted of an attempt to commit an offense although it appears on the trial that the offense was consummated.”

b. Elements.

(1) That the accused did a certain overt act;

pletely abandoned the intended crime, solely because of the person’s own sense that it was wrong,

(2) That the act was done with the specific intent to commit a certain offense under the code;

(3) That the act amounted to more than mere preparation; and

(4) That the act apparently tended to effect the commission of the intended offense.

c. Explanation.

(1) *In general.* To constitute an attempt there must be a specific intent to commit the offense accompanied by an overt act which directly tends to accomplish the unlawful purpose.

(2) *More than preparation.* Preparation consists of devising or arranging the means or measures necessary for the commission of the offense. The overt act required goes beyond preparatory steps and is a direct movement toward the commission of the offense. For example, a purchase of matches with the intent to burn a haystack is not an attempt to commit arson, but it is an attempt to commit arson to applying a burning match to a haystack, even if no fire results. The overt act need not be the last act essential to the consummation of the offense. For example, an accused could commit an overt act, and then voluntarily decide not to go through with the intended offense. An attempt would nevertheless have been committed, for the combination of a specific intent to commit an offense, plus the commission of an overt act directly tending to accomplish it, constitutes the offense of attempt. Failure to complete the offense, whatever the cause, is not a defense.

(3) *Factual impossibility.* A person who purposely engages in conduct which would constitute the offense if the attendant circumstances were as that person believed them to be is guilty of an attempt. For example, if A, without justification or excuse and with intent to kill B, points a gun at B and pulls the trigger, A is guilty of attempt to murder, even though, unknown to A, the gun is defective and will not fire. Similarly, a person who reaches into the pocket of another with the intent to steal that person’s billfold is guilty of an attempt to commit larceny, even though the pocket is empty.

(4) *Voluntary abandonment.* It is a defense to an attempt offense that the person voluntarily and com-

prior to the completion of the crime. The voluntary abandonment defense is not allowed if the

abandonment results, in whole or in part, from other reasons, for example, the person feared detection or apprehension, decided to await a better opportunity for success, was unable to complete the crime, or encountered unanticipated difficulties or unexpected resistance. A person who is entitled to the defense of voluntary abandonment may nonetheless be guilty of a lesser included, completed offense. For example, a person who voluntarily abandoned an attempted armed robbery may nonetheless be guilty of assault with a dangerous weapon.

(5) *Solicitation*. Soliciting another to commit an offense does not constitute an attempt. *See* paragraph 6 for a discussion of article 82, solicitation.

(6) *Attempts not under Article 80*. While most attempts should be charged under Article 80, the following attempts are specifically addressed by some other article, and should be charged accordingly:

- (a) Article 85—desertion
- (b) Article 94—mutiny or sedition.
- (c) Article 1 00—subordinate compelling
- (d) Article 104—aiding the enemy
- (e) Article I 06a—espionage
- (f) Article 128—assault

(7) *Regulations*. An attempt to commit conduct which would violate a lawful general order or regulation under Article 92 (*see* paragraph 16) should be charged under Article 80. It is not necessary in such cases to prove that the accused intended to violate the order or regulation, but it must be proved that the accused intended to commit the prohibited conduct.

d. *Lesser included offenses*. If the accused is charged with an attempt under Article 80, and the offense attempted has a lesser included offense, then the offense of attempting to commit the lesser included offense would ordinarily be a lesser included offense to the charge of attempt. For example, if an accused was charged with attempted larceny, the offense of attempted wrongful appropriation would be a lesser included offense, although it, like the attempted larceny, would be a violation of Article 80.

e. *Maximum punishment*. Any person subject to the code who is found guilty of an attempt under Article 80 to commit any offense punishable by the code shall be subject to the same maximum punishment authorized for the commission of the

offense attempted, except that in no case shall the death penalty be adjudged, nor shall any mandatory minimum punishment provisions apply; and in no case, other than attempted murder, shall confinement exceeding 20 years be adjudged.

f. *Sample specification*.

In that _____ (personal jurisdiction data) did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____, attempt

to (describe offense with sufficient detail to include expressly or by necessary implication every element).

5. Article 81—Conspiracy

a. *Text*. “Any person subject to this chapter who conspires with any other person to commit an offense under this chapter shall, if one or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct.”

b. *Elements*.

(1) That the accused entered into an agreement with one or more persons to commit an offense under the code; and

(2) That, while the agreement continued to exist, and while the accused remained a party to the agreement, the accused or at least one of the co-conspirators performed an overt act for the purpose of bringing about the object of the conspiracy.

c. *Explanation*.

(1) *Co-conspirators*. Two or more persons are required in order to have a conspiracy. Knowledge of the identity of co-conspirators and their particular connection with the criminal purpose need not be established. The accused must be subject to the code, but the other co-conspirators need not be. A person may be guilty of conspiracy although incapable of committing the intended offense. For example, a bedridden conspirator may knowingly furnish the car to be used in a robbery. The joining of another conspirator after the conspiracy has been established does not create a new conspiracy or affect the status of the other conspirators. However,

except that in no case shall the death penalty be

imposed.

f. *Sample specification.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20_____, con-
spire with _____ (and _____) to commit an offense under the Uniform Code of Military Justice, to wit: (larceny of _____, of a value of (about) \$ _____, the property of _____), and in order to effect the ob-
ject of the conspiracy the said _____ (and _____) did

6. Article 82—Solicitation

a. *Text.*

“(a) Any person subject to this chapter who solicits or advises another or other to desert in violation of section 885 of this title (Article 85) or mutiny in violation of section 894 of this title (Article 94) shall, if the offense solicited or advised is attempted or committed, be punished with the punishment provided for the commission of the offense, but, if the offense solicited or advised is not committed or attempted, he shall be punished as a court-martial may direct.

(b) Any person subject to this chapter who solicits or advises another or others to commit an act of misbehavior before the enemy in violation of section 899 of this title (Article 99) or sedition in violation of section 894 of this title (Article 94) shall, if the offense solicited or advised is committed, be punished with the punishment provided for the commission of the offense, but, if the offense solicited or advised is not committed, he shall be punished as a court-martial may direct.”

b. *Elements.*

(1) That the accused solicited or advised a certain person or persons to commit any of the four offenses named in Article 82; and

(2) That the accused did so with the intent that the offense actually be committed.

[Note: If the offense solicited or advised was attempted or committed, add the following element]

(3) That the offense solicited or advised was (committed) (attempted) as the proximate result of the solicitation.

c. *Explanation.*

(1) *Instantaneous offense.* The offense is com-
discharge, forfeiture of all pay and allowances, and

plete when a solicitation is made or advice is given with the specific wrongful intent to influence another or others to commit any of the four offenses named in Article 82. It is not necessary that the person or persons solicited or advised agree to or act upon the solicitation or advice.

(2) *Form of solicitation.* Solicitation may be by means other than word of mouth or writing. Any act or conduct which reasonably may be construed as a serious request or advice to commit one of the four offenses named in Article 82 may constitute solicitation. It is not necessary that the accused act alone in the solicitation or in the advising; the accused may act through other persons in committing this offense.

(3) *Solicitations in violation of Article 134.*

Solicitation to commit offenses other than violations of the four offenses named in Article 82 may be charged as violations of Article 134. *See* paragraph 105. However, some offenses require, as an element of proof, some act of solicitation by the accused. These offenses are separate and distinct from solicitations under Articles 82 and 134. When the accuser’s act of solicitation constitutes, by itself, a separate offense, the accused should be charged with that separate, distinct offense—for example, pandering (*see* paragraph 97) and obstruction of justice (*see* paragraph 96) in violation of Article 134.

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.* If the offense solicited or advised is committed or (in the case of soliciting desertion or mutiny) attempted, then the accused shall be punished with the punishment provided for the commission of the offense solicited or advised. If the offense solicited or advised is not committed or (in the case of soliciting desertion or mutiny) attempted, then the following punishment may be imposed:

(1) To desert—Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

(2) To mutiny—Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(3) To commit an act of misbehavior before the enemy—Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(4) To commit an act of sedition—Dishonorable

confinement for 10 years.

f. *Sample specifications.*

(1) *For soliciting desertion (Article 85) or mutiny (Article 94).*

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____ 20 _____, (a time of war) by (here state the manner and form of solicitation or advice), (solicit) (advise) (and _____) to (desert in violation of Article 85) (mutiny in violation of Article 94) [Note: If the offense solicited or advised is attempted or committed, add the following at the end of the specification:] and, as a result of such (solicitation) (advice), the offense (solicited) (advised) was, on or about _____, 20 _____, (at/on board—location), (attempted) (committed) by _____ (and _____)

(2) *For soliciting an act of misbehavior before the enemy (Article 99) or sedition (Article 94).*

In that _____ (personal jurisdiction data) did, (at/on board—location), on or about _____ 20 _____, (a time of war) by (here state the manner and form of solicitation or advice), (solicit) (advise), (and _____) to commit (an act of misbehavior before the enemy in violation of Article 99) (sedition in violation of Article 94) [Note: If the offense solicited or advised is committed, add the following at the end of the specification:] and, as a result of such (solicitation) (advice), the offense (solicited) (advised) was, on or about _____ 20 _____, (at/on board—location), committed by _____ (and _____)

7. Article 83—Fraudulent enlistment, appointment, or separation

a. *Text.*

“Any person who—

(1) procures his own enlistment or appointment in the armed forces by knowingly false representation or deliberate concealment as to his qualifications for that enlistment or appointment and receives pay or allowances thereunder; or

(2) procures his own separation from the armed forces by knowingly false representation or deliberate concealment as to his eligibility for that separation; shall be punished as a court-martial may direct.”

b. *Elements.*

(1) *Fraudulent enlistment or appointment.*

(a) That the accused was enlisted or appointed in an armed force;

(b) That the accused knowingly misrepresented or deliberately concealed a certain material fact or facts regarding qualifications of the accused for enlistment or appointment;

(c) That the accused’s enlistment or appointment was obtained or procured by that knowingly false representation or deliberate concealment; and

(d) That under this enlistment or appointment that accused received pay or allowances or both.

(2) *Fraudulent separation.*

(a) That the accused was separated from an armed force;

(b) That the accused knowingly misrepresented or deliberately concealed a certain material fact or facts about the accused’s eligibility for separation; and

(c) That the accused’s separation was obtained or procured by that knowingly false representation or deliberate concealment.

c. *Explanation.*

(1) *In general.* A fraudulent enlistment, appointment, or separation is one procured by either a knowingly false representation as to any of the qualifications prescribed by law, regulation, or orders for the specific enlistment, appointment, or separation, or a deliberate concealment as to any of those disqualifications. Matters that may be material to an enlistment, appointment, or separation include any information used by the recruiting, appointing, or separating officer in reaching a decision as to enlistment, appointment, or separation in any particular case, and any information that normally would have been so considered had it been provided to that officer.

(2) *Receipt of pay or allowances.* A member of the armed forces who enlists or accepts an appointment without being regularly separated from a prior enlistment or appointment should be charged under Article 83 only if that member has received pay or allowances under the fraudulent enlistment or ap-

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